

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

ADJUSTMENT OF RATES AND TERMS FOR
PREEXISTING SUBSCRIPTION SERVICES
AND SATELLITE DIGITAL AUDIO RADIO
SERVICES

Docket No. 2006-1 CRB DSTRA

WRITTEN REBUTTAL TESTIMONY OF BRUCE G. SILVERMAN

INTRODUCTION

1. My name is Bruce G. Silverman. I am a marketing, advertising, and media consultant. I have been retained by counsel for Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM") (collectively, "SDARS" (satellite digital audio radio services) or "Services") to provide expert testimony in this proceeding as a rebuttal witness. The focus of my testimony is the contention by SoundExchange's expert Dr. Michael Pelcovits that agreements entered into by Sirius and XM with non-music content providers should be used as a benchmark for the sound recording performance royalty rate to be set in this proceeding. Specifically, I will discuss why it is not appropriate to rely upon such agreements as benchmarks for the sound recording performance royalty rate without first adjusting for the many benefits conveyed by these agreements to Sirius and XM above and beyond the value of the non-music content itself. I will then discuss in detail one specific such benefit – namely, the valuable publicity that Sirius and XM received from these agreements – and will quantify at least a portion of the costs that

Sirius and XM would have had to incur had they purchased equivalent publicity in the marketplace.

BACKGROUND AND EXPERIENCE

2. I have spent my entire forty-year professional career in the marketing, advertising, and media industry. I landed my first advertising job in 1967 at the Ogilvy & Mather agency in New York City as a messenger and, over the course of the next thirteen years, rose through the ranks to the position of Senior Vice President/Executive Creative Director and member of the agency's U.S. Council of Directors. While at O&M, I created a number of very successful advertising campaigns, including "Don't Leave Home Without It" for American Express, "Merrill Lynch is Bullish on America," "Come to Shell for Answers," and "The Best Engineered Car in the World" for Mercedes Benz. In addition, I headed teams on the Lever Brothers, Panasonic, Nabisco, Owens-Corning Fiberglas, TWA, International Paper, and Mattel accounts.

3. In 1981, I joined Bozell & Jacobs, a large national advertising agency, as Executive Vice President/Executive Creative Director. At Bozell, I led creative teams on American Airlines, Greyhound, Quaker Oats, Zale Corporation, Ryder, Jaguar, Southwestern Bell, Armour, Minolta, and Pace Foods. I also led the team that created the AAdvantage Program for American Airlines, the industry's first frequent flyer program.

4. I headed Batten, Barton, Durstine & Osborne's (BBDO) western operations as Executive Vice President from 1984 to 1986. While at BBDO, which is part of the global marketing communications holding company Omnicom, I managed such accounts as Apple Computer International, Union Bank of California, Sizzler Restaurants, Dodge, Sebastiani Vineyards, and Coldwell Banker.

5. Following BBDO, I joined an entrepreneurial Los Angeles agency called Asher/Gould as President, COO, and partner. During my eleven years at Asher/Gould, the agency grew to become a top 100 shop, handling such clients as Suzuki, Pizza Hut, Baskin-Robbins, Pabst, SunAmerica Insurance, and the California Department of Health Services.

6. In 1997, I joined Initiative Worldwide (then known as Western International Media Corporation), the world's largest media planning and buying agency, eventually becoming President and CEO of the Initiative Partners division, which handled the bulk of the firm's U.S. business. Initiative planned and placed over \$11 billion in media each year in the United States (including \$1.5 billion in radio) for more than 500 clients, including the Walt Disney Company, Johnson & Johnson, Unilever, The Home Depot, Albertson's, Taco Bell, Bally's Total Fitness, and Six Flags.

7. In 2004, I became President and partner at an agency called WongDoody (named for its founders, Tracy Wong and Patrick Doody), an entrepreneurial group, which at the time had offices in Los Angeles, Seattle, and Dallas. The agency's accounts included MGM Home Video, Alaska Airlines, Sony Digital Entertainment, the Los Angeles Dodgers, Clif and Luna bars, Autodesk, UCLA Anderson Graduate School of Business, Nordstrom, and divisions of the Bank of America. I retired from WongDoody in 2005 to focus on a media company I had helped found two years earlier called 24/6, Inc. and my consulting practice.

8. I have served as a member of the Board of Directors of the American Association of Advertising Agencies, as Vice Chairman of the AAAA Western Region, and as Vice President of the Los Angeles Advertising Agency Association. I have been the recipient of nearly every significant advertising award, including two Gold Lions from the Cannes International Advertising Festival. I have guest lectured on advertising, marketing, and media at UCLA, the

University of Southern California, Pepperdine University, Stanford University, California State University San Diego, Cal State Los Angeles, Cal State Northridge, Rice University, the University of Houston, and the University of Texas. I have been interviewed countless times by advertising journals, and I have appeared many times on radio and television as a commentator on advertising and media-related issues.

9. I have served as an expert witness on a number of occasions on marketing, advertising, and media issues in cases involving trademark infringement, unfair competition, publicity rights, and breach of contract between advertisers, agencies, and media companies. A copy of my curriculum vitae is provided as Appendix 1, which is attached to my testimony.

ASSIGNMENT AND SUMMARY OF CONCLUSIONS

10. My testimony responds to the assertion by Dr. Pelcovits that the amounts paid by Sirius and XM pursuant to non-music programming agreements, including Sirius' deal with Howard Stern, should be used as a benchmark for the sound recording performance royalty being established in this proceeding. In particular, I have been asked to discuss, based on my decades of expertise in advertising and marketing, the SDARS' marketing rationale for entering into big-money news/talk/sports¹ agreements and to quantify the publicity value of a number of these agreements, including those with Howard Stern, Oprah Winfrey, the National Football League ("NFL"), Major League Baseball ("MLB"), Opie & Anthony, and Martha Stewart – significant value (as I show) generated for XM and Sirius over and above the right to transmit the content.

¹ Although programming such as that offered by Howard Stern, Oprah Winfrey, and Martha Stewart is sometimes referred to as "entertainment" programming, for simplicity, I will refer to the non-music programming I discuss in my testimony as "news/talk/sports" programming.

11. Based on my analysis, I conclude that it is not appropriate to use the amounts paid by Sirius and XM pursuant to news/talk/sports programming agreements as a guidepost for the amount that those services should pay to play sound recordings. That type of direct comparison does not properly take into account (i) the difference between recorded music, which is available from many sources including from free terrestrial radio, and the SDARS' news/talk/sports channels and shows, most of which are, to varying degrees, exclusive to the services or (ii) the related, and extremely valuable, strategic role Sirius' and XM's news/talk/sports programming has played (and continues to play) in their marketing efforts, a role that sound recordings do not and cannot, by themselves, play.

12. There is an old Scottish expression that applies as much to marketing as it does in its original context: "You can't save souls in an empty church." The first and perhaps most important step in any marketing campaign is to generate awareness: to "fill the church." The second step is to help consumers rationalize a decision to buy by positively differentiating the product or service. My testimony will illustrate how Sirius' and XM's investments in news/talk/sports were much more than programming expenses; they have generated millions of dollars worth of publicity that has increased awareness about the unique attributes and benefits of satellite radio. The publicity engendered by the news/talk/sports deals entered into by Sirius and XM has helped to differentiate the two services from each other and from terrestrial radio and has provided millions of consumers with a rationale to pay for a service – radio – that they historically had gotten for free.

13. The materials I reviewed in the course of my assignment are listed in Appendix 2, which is attached to my testimony.

ANALYSIS

14. Dr. Pelcovits has proposed Sirius' agreement with Howard Stern as a benchmark for the royalties that record companies and performing artists should receive from the satellite radio services for the right to perform sound recordings. In his amended written direct testimony, he contends more broadly that the hundreds of millions of dollars paid out annually by Sirius and XM in connection with their various news/talk/sports programming deals should, as a percentage of revenue, be used as a benchmark for a "fair" sound recording performance royalty. This contention that the sound recording royalty rate should be based on amounts paid by the Services for non-music deals is misguided.

I. THE STRATEGIC IMPORTANCE OF THE SERVICES' NON-MUSIC DEALS

15. As an initial matter, news/talk/sports, on one hand, and music, on the other, play very different roles in the listener experience and, even more importantly, in creating awareness for the SDARS and in differentiating them from terrestrial radio and from each other. These different roles have profound consequences for the proper valuation of these deals.

16. Recorded music is ubiquitous. The recorded music that is played on the Services (with the exception of certain specially licensed programming such as Sirius' Metropolitan Opera channel) is readily available on, among other sources, terrestrial radio. It is not exclusive. And recorded music is about to become even more ubiquitous as (free) terrestrial "HD" digital radio expands. One of the key aspects of Sirius' and XM's original consumer proposition – i.e., specialized channels offering unique music formats such as country, reggae, show tunes, etc. – already is being emulated and offered for free (albeit with commercials) by many terrestrial radio stations in "HD" format, thus undermining one of the key initial consumer benefits of satellite radio.

17. By contrast, much of the news/talk/sports programming that Sirius and XM offer *is* exclusive to at least some degree. Sirius' Howard Stern and Martha Stewart cannot be heard on terrestrial radio or on XM. XM's Oprah Winfrey cannot be heard on terrestrial radio or on Sirius. Every NFL game cannot be heard on radio in every market throughout the country – with the listener's favorite announcers providing the play-by-play and analysis – anywhere except on Sirius, nor can a 24/7 NFL channel such as the channel offered on Sirius be heard anywhere on the radio except on Sirius. New York Yankees or Boston Red Sox fans living in Los Angeles, Dallas, or Detroit cannot hear all of the broadcasts of their favorite team on terrestrial radio, but they are available – exclusively – on XM. NASCAR, rapidly becoming America's most popular sport, is not available on terrestrial radio in all U.S. markets, but it is on Sirius, which offers a 24/7 NASCAR channel, a show by NASCAR champion Tony Stewart, and multiple channels during NASCAR races featuring pit-to-driver conversations. The list goes on and on. Moreover, virtually all of this exclusive programming involves major media personalities, stars, sports leagues, or news entities – in essence, “brands” that by association add value to the Sirius and XM brands, as I understand Dr. Erich Joachimsthaler explains in his rebuttal testimony. The exclusive nature of Sirius' and XM's news/talk/sports programming is a key differentiator for the Services vis-à-vis terrestrial radio and vis-à-vis each other. Non-exclusive sound recordings cannot – and do not – play a comparable role.

18. Both satellite radio services recognized this reality early on, when their efforts to acquire and retain subscribers with marketing campaigns that focused principally on commercial-free music were not working well enough to drive the growth they needed to achieve long-term viability. XM, which began service in September 2001, finished 2003 with 1,360,228

subscribers.² Sirius, which did not start service until July 2002, finished 2003 with 261,061 subscribers.³ Together, the combined total subscribers across the entire country (approximately 1,621,000) represented fewer listeners than the combined audience of a couple of middle-ranked Los Angeles FM radio stations. It was clear that the satellite radio services had to re-gear their product offerings and consumer marketing strategies to survive.

19. Thus, the news/talk/sports “arms race” began. By focusing their marketing efforts on news/talk/sports programming, Sirius and XM were able to benefit in at least two ways: first, from the differentiation that each provided vis-à-vis terrestrial radio and from its satellite radio competitor; and second, from the publicity that the non-music deals generated.

20. Sirius fired the first shot when it signed its blockbuster seven-year deal with the National Football League in December 2003.⁴ XM quickly responded, initiating MSNBC news programming in February 2004, followed by the launch of an Instant Traffic and Weather Channel a month later, both critical missing elements in the eyes of consumers who were accustomed to getting news, traffic, and weather information on their terrestrial radio dials.⁵ XM

² See Form 10-K, XM Satellite Radio Inc., at 32 (Mar. 1, 2007), available at http://media.corporate-ir.net/media_files/IROL/11/115922/reports/10K307.pdf.

³ See News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2003 Financial and Operating Results* (Jan. 28, 2004), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=157236&cat=earnings&newsroom=>.

⁴ See News Releases, *Sirius and NFL Announce Multi-Year Broadcast and Marketing Agreement* (Dec. 16, 2003), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=152378&cat=&newsroom=>.

⁵ See News Releases, *XM Satellite Radio Adds New Talk Radio Programs and MSNBC to Programming Lineup* (Jan. 28, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1226; News Releases, *XM Launches Radio's First Advanced Instant Traffic & Weather Service for Major Markets*

later that year added National Public Radio programming, former Public Radio star commentator Bob Edwards, and the “shock jock” duo Opie & Anthony.⁶

21. The “arms race” escalated dramatically on October 6, 2004, when Sirius announced that Howard Stern, one of the highest profile, most listened-to voices on terrestrial radio, would move to Sirius in early 2006.⁷ This announcement generated massive news coverage and publicity as Stern made appearance after appearance on major media outlets; proclaiming the wonders of Sirius. He even touted Sirius incessantly on his daily CBS Radio show. Consumers began to get the message: satellite radio must be “for real” if the self-described “King of All Media” was making it his new radio home. The Stern signing also caught the attention of Madison Avenue. Major media planning and buying agencies, which had virtually ignored satellite radio to that point – and in some cases, predicted an early demise for the concept – revised their thinking. Advertisers were now being told to “pay attention to satellite radio.” As a case in point from my personal experience, I was President of the WongDoody advertising agency in Los Angeles at the time the Stern/Sirius deal was made public. I recall a conversation with my former colleague, Lucy Hughes, Research Director of Initiative Media (where I had been President for six years prior to joining WongDoody), in

Nationwide (Mar. 1, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1224.

⁶ See News Releases, *XM Radio’s Bob Edwards Named 2004 Radio Hall of Fame Inductee* (Aug. 17, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=867; News Releases, *Talk Radio Stars Opie and Anthony to Join XM Satellite Radio* (Aug. 5, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=870.

⁷ See News Releases, *Howard Stern and Sirius Announce the Most Important Deal in Radio History* (Oct. 6, 2004), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=151947&cat=&newsroom=>.

which she told me that Initiative's "Crystal Ball" PowerPoint presentation (which I had co-authored with her, and which was used to update clients on how technology and fragmentation were affecting the media landscape and to predict future trends in media) had been revised – virtually overnight – to go from "bearish" to "bullish" about satellite radio as a direct result of Howard Stern's announcement that he was moving to Sirius. XM added to the newfound excitement about satellite radio by announcing its long-term deal with Major League Baseball in late October 2004.⁸

22. The "arms race" continued when Sirius followed up its Howard Stern deal by announcing that NASCAR would be switching from XM to Sirius and that multimedia powerhouse Martha Stewart – and her loyal female following – would be premiering on the Sirius service in 2006.⁹ XM added programming by, among others, the well-known radio psychologist Dr. Laura Schlessinger, the Indy Racing League, and Air America.¹⁰ Recorded

⁸ See News Releases, *Major League Baseball Partners with XM Satellite Radio for 11-Year, \$650 Million Broadcast and Marketing Agreement* (Oct. 20, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1209.

⁹ See News Releases, *NASCAR Selects Sirius as New Home on Satellite Radio* (Feb. 22, 2005), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=156582>; News Releases, *Sirius Satellite Radio to Launch Exclusive Martha Stewart Channel* (Apr. 18, 2005), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=160512&cat=programming%20announcements&newsroom=>.

¹⁰ See News Releases, *XM Satellite Radio Expands 2005 Talk Programming Lineup with Dr. Laura and G. Gordon Liddy* (Jan. 5, 2005), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1203; News Releases, *XM Satellite Radio, Indy Racing League Announce Multi-Year Broadcasting and Marketing Agreement* (Mar. 3, 2005), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1195; News Releases, *XM and Air America Radio Announce Long Term Agreement; XM to Be Official Satellite Radio Network of Air America* (Apr. 11, 2005), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=819.

music, because of its “commodity” nature, was reduced to playing a secondary role in how the Services positioned themselves and in their marketing mix.

23. The marketing power of the Howard Stern-Sirius deal manifested itself almost immediately. Despite the fact that Howard Stern was not going to start broadcasting on Sirius for another fifteen months, Sirius’ subscriber base jumped by nearly half a million subscribers in the fourth quarter of 2004 (an increase dwarfing all previous individual quarterly increases), bringing the year-end tally to 1,143,258.¹¹ The marketing benefit of the Howard Stern deal became even more apparent when Stern began broadcasting on Sirius in January 2006. In the fourth quarter of 2005, Sirius added a record 1,142,640 net subscribers, and another 761,187 net subscribers came onboard in the first quarter of 2006.¹² Sirius finished 2006 with 6,024,555 subscribers, nearly double its total of a year earlier.¹³ XM, which continued to add news/talk/sports programming throughout the year – including an exclusive channel featuring America’s top female media personality, Oprah Winfrey – had 7,628,552 subscribers as of

¹¹ See News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2004 Financial and Operating Results* (Jan. 26, 2005), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=154690&cat=&newsroom=>; News Releases, *Sirius Satellite Radio Announces Third Quarter 2004 Financial and Operating Results* (Oct. 27, 2004), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=150206&cat=&newsroom=>.

¹² See News Releases, *Sirius Satellite Radio Reports Record Subscriber Growth and Revenue for Fourth Quarter and Full-Year 2005* (Feb. 17, 2006), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=187963&cat=&newsroom=>; News Releases, *Sirius Satellite Radio Reports Strong First Quarter 2006 Results* (May 2, 2006), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=194903&cat=&newsroom=>.

¹³ See News Releases, *Sirius Reports Fourth Quarter and Full Year 2006 Results* (Feb. 27, 2007), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=231374&cat=&newsroom=>.

December 31, 2006.¹⁴ The marketing intent and effect of the exclusive news/talk/sports (and exclusive music) programming deals entered into by Sirius and XM was by no means incidental. It is clear from internal company documents that such effects were considered at the highest levels of management. For example, [[

]].” See “The First Sustainable Advantage,” SIR00039438 at SIR00039442 (Oct. 23, 2003). Similarly, a Sirius document presented to the Board concerning Howard Stern states that Stern will [[

]].” “Howard Stern” Sirius document, SIR00038000, at SIR00038011. It further stated that Sirius “[[

]].” *Id.* A copy of this document is attached as SDARS-Silverman Exhibit 1.

¹⁴ See News Releases, “*Oprah & Friends*” Exclusive Radio Channel to Launch on XM Satellite Radio (Feb. 9, 2006), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1155; News Releases, *XM Adds Nearly 1.7 Million New Subscribers in 2006 for Total of More than 7.6 Million Subscribers, Achieves Positive Cash Flow from Operations During Fourth Quarter 2006* (Jan. 5, 2007), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1409.

24. Similarly, XM [[

]]:

[[

]].

See "Oprah & XM" presentation (Dec. 7, 2005), XMCRB00141745 at XMCRB00141749.

25. The Oprah deal [[

]]. *See* XM/Harpo Agreement, XMCRB

00034928 at XMCRB 00034932-41 (SX Ex. 132 DR).

26. The XM/Oprah deal, [[

]], is a prime example of how XM's and Sirius' non-music

programming deals support – indeed, are integral to – the Services’ marketing efforts. In my opinion, XM actually substantially understated Oprah’s value to it as a marketing resource when it allocated “only” [[]] million of her annual fee to its marketing budget. According to Harpo, Oprah’s “normal” personal appearance fee for a one-day event runs anywhere from \$750,000 to \$1.5 million (depending on the nature of the appearance); therefore, just one of the many marketing-use provisions of the XM/Harpo deal – [[

]] – has a “street value” of \$1.5 million to \$3 million. These explicit and integral components of the deal have no analogue with respect to the right to play sound recordings. XM’s license from SoundExchange does not, for example, commit Barry Manilow, Sting, or Beyonce Knowles to personally urge radio listeners to hear their music on XM.

27. Similarly, XM’s deal with Opie & Anthony calls for [[

]].”

See XM/Opie & Anthony Agreement, 2005-5 XM CRB 00014180 at XMCRB 00014183-84.

Opie & Anthony also must [[

]].” *See id.*

28. Another example of how marketing components are integrated into the various news/talk/sports deals is Sirius’ deal with the National Football League, which lists a number of options (specifics to be determined over time) as to how the league would [[

]]. See Sirius/NFL

Agreement, SIR00040084 at SIR00040098 (SX Ex. 129 DR).

29. Similarly, Sirius' deal with the National Basketball Association spells out the many ways the service would be merchandised in [[

]]. See Sirius/NBA Agreement, SIR00028029 at 00028037-38 (SX Ex. 131 DR).

30. Martha Stewart's deal with Sirius also called for promotional tie-ins with various Martha Stewart Omnimedia entities, including [[

]].” See Sirius/Martha Stewart Omnimedia Agreement, SIR00027583 at 00027591 (SX. Ex. 128 DR).

31. In fact, nearly all of the news/talk/sports deals that I have reviewed in connection with my assignment go beyond programming to discuss the marketing aspects/requirements of the relationship.

32. Only one conclusion can be reached about the relative marketing power of non-exclusive sound recordings versus news/talk/sports programming: recorded music is a commodity, but news/talk/sports programming – especially *exclusive* news/talk/sports

programming, as costly as it may be – is the difference-maker from a marketing standpoint.

“Displaced” baseball fans (people who do not live in the market where their team’s games are available on terrestrial radio) will be attracted to XM; “displaced” NFL football fans will be attracted to Sirius. Oprah Winfrey and Martha Stewart fans, unable to find comparable programming on terrestrial radio, will be attracted to XM or Sirius. Howard Stern fans, now unable to hear him on terrestrial radio, will be attracted to Sirius.

II. THE DOLLAR VALUE OF PUBLICITY GENERATED BY SIRIUS’ AND XM’S NEWS/TALK/SPORTS DEALS

33. Some of the most powerful evidence of the marketing and promotional benefits of the Services’ financial commitment to – and consumer interest in – news/talk/sports programming is the publicity generated by the announcements, on-air debuts, and other newsworthy aspects of Sirius’ and XM’s “star” news/talk/sports channels. In order to convey to the Judges a sense of the magnitude of this publicity, I was asked to tabulate and value some of the “media impressions” generated by some of the Services’ key non-music deals, including XM’s agreements with MLB, Oprah Winfrey, and Opie & Anthony and Sirius’ agreements with the NFL, Howard Stern, Martha Stewart, and NASCAR.

A. Methodology

34. Under my direction, the Précis division of Millward Brown, a major market research firm located in Chicago, conducted research to capture a record of certain television and print media “hits” (i.e., television appearances by personalities, news or entertainment programming mentions, and magazine and newspaper articles) that resulted from Sirius’ and XM’s deals with certain talk personalities and sports leagues to help determine the marketing/promotional value of that programming. Specifically, Précis measured “hits” for

Sirius' deals with Howard Stern, Martha Stewart, the NFL, and NASCAR and XM's deals with Oprah Winfrey, MLB, and Opie & Anthony. This research, which I describe more fully below, was conducted in accordance with industry-accepted standards with which I am familiar. I believe the results are illuminating regarding the important strategic role that the various deals played in Sirius' and XM's marketing efforts.

35. Television hits were provided to Précis by VMS, a video monitoring service that downloads "closed-captioned" text and video descriptions of television programming running nationally on the major broadcast and cable networks as well as local programming from stations in the top twenty U.S. markets into its database.¹⁵ Using Boolean search methodology, VMS was able to "link" television mentions of Sirius and Howard Stern, Sirius and the NFL, Sirius and Martha Stewart, Sirius and NASCAR, XM and MLB, XM and Oprah Winfrey, and XM and Opie & Anthony so as to deliver "hits" that fit defined parameters. These "hits" were reported by date, time, network/channel, content (in text form), and length. Our search parameters required Précis to provide "hit" data for each Sirius and XM talk/sports deal from around the time each deal was announced (e.g., Sirius/Stern, 10/6/2004) through June 30, 2007. Television "hits" were reported from the top twenty U.S. markets.

¹⁵ The top twenty United States television markets are New York, Los Angeles, Chicago, Philadelphia, Boston, San Francisco/Oakland/San Jose, Dallas/Fort Worth, Washington, D.C., Atlanta, Houston, Detroit, Tampa/St. Petersburg, Seattle/Tacoma, Phoenix, Minneapolis/St. Paul, Cleveland/Akron, Miami/Ft. Lauderdale, Denver, Sacramento/Stockton/Modesto, and Orlando/Daytona Beach. Major broadcast networks tracked include CBS, NBC, ABC, Fox, WB (during the period it operated), UPN (during the period it operated), and CW (since it started operating in 2007). Cable networks tracked include CNN, CNN Headline News, CNNfn, MSNBC, Fox News, Bloomberg, E! Entertainment Television, ESPN, ESPN2, and TechTV. The system also tracks nationally syndicated programming such as Entertainment Tonight, Access Hollywood, Oprah Winfrey and Dr. Phil.

36. Newspaper and magazine hits were provided to Précis by Factiva (a division of Dow Jones), a monitoring service which loads full text from newspapers in the top 100 U.S. markets and major national news and business magazines (e.g., *Time*, *Newsweek*, *U.S. News and World Report*, etc.) into its searchable database. A Boolean search methodology again was used to identify "linked" Sirius and XM news/talk/sports programming stories from the newspapers and magazines tracked during the time periods identified above. In addition, Précis ran a narrower search for the NFL, MLB, NASCAR, and Oprah deals using the Lexis-Nexis "Major U.S. Newspapers" and "Magazine Stories, Combined" databases for the time period beginning on the first day of the month that each such deal was announced and ending on the last day of the following month in order to pick up certain articles that Factiva missed. Précis then sorted through all the television, newspaper, and magazine data collected to eliminate duplicates and hits that were not properly characterized as publicity associated with the deals being analyzed.

37. The second major step in the process consisted of calculating what the "advertising cost" of each "hit" would have been had the time or space been purchased by Sirius or XM. Précis managed this step internally under my direction. For television, the time of each "hit" was calculated and converted into television commercial units, i.e., 30-second, 15-second, or 10-second "spots." For example, if a television news report about XM signing Oprah Winfrey ran 63 seconds, it was considered the equivalent of two 30-second commercials on the show in which the "hit" occurred. Précis is a subscriber to the Spot Quotations and Data Service ("SQAD"), an advertising industry-supported service that collects and reports on national ("network") and local ("spot") market television commercial pricing. SQAD data is considered the "standard" by which agencies and advertisers can measure how well they execute television

media buys relative to the industry as a whole. Utilizing SQAD data, Précis calculated the equivalent commercial cost of each "hit."

38. Précis also maintains a computerized database of advertising rates for the 100 top newspapers in the United States, as well as of the magazines that are tracked by Factiva. Précis calculated the size and/or lineage of each newspaper or magazine "hit" by converting the number of words in an article to column inches in newspapers and page widths in magazines, thus allowing identification of an equivalent advertising (size) unit in the publication in which it appeared. Précis then calculated what the cost of that unit would have been had Sirius or XM purchased it based on each publication's "open" rate.

39. The third major phase of the process involved determining the monetary marketing value of each "hit." Précis provided me with reports and back-up (the full text of each newspaper or magazine article and a summary of the content of each television news story or on-air appearance by one of the satellite service personalities) for each "hit." I enlisted a team of qualified individuals under my supervision to perform a second check on top of Précis' initial check to verify that every "hit" was in fact news coverage or a personal appearance that was prompted by a Sirius or XM deal with one of the specific news/talk/sports programs or personalities under analysis. In order to be counted as a "marketing value" hit, either the thrust of the news story or TV report or appearance had to be the result of one of the programming deals, or one of the deals had to factor in an important way in the substance of the coverage. For example, a newspaper article reporting on XM's deal with MLB would qualify as a "marketing hit." Another test we applied to qualify "hits" was to evaluate whether or not Sirius or XM would have been mentioned in the story at all were it not for the service's relationship with the personality or league. To achieve this level of verification, the content of every "hit" was

checked for relevance by a team of well-qualified individuals I recruited and supervised. Each news article or TV mention or appearance was only counted once, even if more than one program that we were accounting for was mentioned. I personally spot-checked the work of each team member.

40. As noted above, Précis, and its vendor, Factiva, are only able to gather magazine "hits" from publications that upload all of their editorial content to the Internet. Unfortunately, many of the magazines (including such entertainment-oriented publications as *Esquire*, *New York*, *Sports Illustrated*, *People*, and *US Weekly*) that carried stories about the various news/talk/sports deals fell into the "not uploaded" category. The public relations departments of Sirius and XM both maintain "clip files" that include copies of magazine articles about their respective services. Those "clip files" were reviewed internally at the two Services, and copies of relevant articles were made available to us. Using basically the same approach as Précis (we downloaded media rate cards for the magazines in question from the Internet), we applied an advertising cost to the relevant articles that appeared in those publications and had not already been identified as "hits."

41. The final step in the process was to convert the "advertising cost" to "marketing value." Public relations professionals refer to publicity as "advertising that money can't buy." But it can be valued.

42. "Straight advertising cost" understates the value of publicity because, as media and other marketing communication professionals long have recognized, consumer attention to advertising is far less than attention to and viewership of television programming or newspaper and magazine *editorial* content. (And new technologies, such as TiVo, that make it easy for viewers to skip commercials are exacerbating the problem, making TV an ever less effective

advertising media choice.) Recognizing this, most major public relations agencies, including Fleishman Hilliard, Edelman, The Rogers Group, and Ruder & Finn (all of whom I queried on this issue, as well as the Public Relations Society of America and the Association of Public Relations Firms) use anywhere from a 3x to 9x commercial cost multiplier to establish the "marketing value" of TV "publicity hits." I chose to use the most conservative multiplier, 3x, for this analysis.

43. In developing a "content versus advertising" multiplier for newspaper and magazine "hits," I based my calculations on longstanding advertising industry readership research, which reveals that written editorial content is read, on average, five times more closely than even the best performing advertising in the same media. *See Journal of Marketing Research*, Vol XXV, at 168-77 (May 1988).

44. In sum, I tripled the estimated commercial cost to establish a "marketing value" for each television "hit," and I used a 5x multiplier to establish a "marketing value" for each newspaper or magazine "hit."

B. Conservative/Understated Nature of Calculations

45. The methodology we used resulted in a very conservative estimate of the marketing value of the deals we analyzed. As noted above, we only reported television "hits" from the top twenty U.S. markets; this was done for time and technology reasons. The financial result would have been much greater had we been able to report "hits" from all 211 U.S. markets. Further, not all television channels are monitored, and not all programming is closed-captioned (which, as noted, is the only programming for which text may be downloaded). Consequently, the television values reported below likely are quite understated.

46. For similar reasons, the marketing value of newspaper and magazine exposure is significantly understated. We were unable to retrieve information from most of the "glossy" magazines that focus on entertainment or from most advertising, broadcast, and media industry trade publications. Finally, the technology we used does not factor in the added value of a photograph; it simply counts lines or inches. Yet, as the old expression goes, "a picture is worth a thousand words." In the personality-driven world of entertainment marketing, a picture is undoubtedly worth twice that.

47. Finally, we did not attempt to project publicity yet to be generated by any of the various deals, further understating their publicity value.

48. Ironically, the venue that probably has the most potential marketing/promotion value for Sirius and XM – terrestrial radio (with its millions of potential satellite radio subscribers) – is nearly impossible to track effectively. For that reason, I have not included terrestrial radio in my analysis except for one personality (and that only in a very limited way), as described below. Given the television, newspaper, and magazine coverage we were able to gather on the deals, it is extremely likely that Sirius' and XM's talk/sports announcements generated heavy radio coverage as well, particularly in major media markets such as New York, Los Angeles, and Chicago. I did not include, for example the extensive coverage that Sirius gets on NFL Radio. The fact that I did not include the value of this radio coverage in my analysis is yet another reason why the numbers in my report are significantly understated.

49. Although the Internet is a searchable medium, it is so extensive that it is impractical for cost reasons to assign a marketing value to publicity regarding the talk/sports deals that appeared online. It is very likely that the satellite services benefited greatly from online publicity, given America's fascination with Howard Stern, Oprah Winfrey, Martha

Stewart, the NFL, Major League Baseball, NASCAR, and the other media personalities and entities that were part and parcel of the deals. This coverage was not quantified and included in my numbers. For example, a specific page on Martha Stewart's website is devoted to her radio show on Sirius,¹⁶ and Howard Stern's interview on "60 Minutes" remains available for viewing on the Internet.¹⁷ Likewise, Oprah Winfrey's promotion on her television show of her deal with XM can be viewed online.¹⁸ It is highly probable that the most undercounted publicity is in the sports programming area; each of the sports deals I reviewed included extensive cross-promotion activity, in which Sirius or XM would be promoted at baseball and football stadiums, at racetracks, on league websites, in game or race coverage, etc. I did not attempt to quantify the value of such promotional activity.

50. Based on my experience, I estimate with reasonable certainty that the total marketing/promotional value of the publicity generated by Sirius' and XM's news/talk/sports deals is at least fifty percent greater than the calculated totals stated below.

* * *

¹⁶ See Martha Stewart Radio on the Sirius Satellite Radio Network, at http://www.marthastewart.com/portal/site/mslo/menuitem.4af27a8e9e64e1611e3bf410b5900aa0/?vgnextoid=971acf380e1dd010VgnVCM1000005b09a00aRCRD&vgnnextchannel=971acf380e1dd010VgnVCM1000005b09a00aRCRD&rsc=navigationcorporate_Homepage_Homepage&lastnavigatedchannel=c479cf380e1dd010VgnVCM1000005b09a00aRCRD.

¹⁷ See Howard Stern . . . on 60 Minutes, at http://60minutes.yahoo.com/segment/2/howard_stern.

¹⁸ See XM on the Oprah Winfrey Show, at <http://www.orbitcast.com/archives/video-xm-on-the-oprah-winfrey-show.html>.

Sirius/Howard Stern Deal

51. From his earliest days on terrestrial radio, Howard Stern has been a self-promoting publicity juggernaut. His move from terrestrial to satellite radio proved to be a publicity bonanza for Stern and Sirius. Stern himself launched the publicity barrage early on the morning of October 6, 2004, when he announced his deal with Sirius on his nationally syndicated CBS Radio show.

52. Since then, Stern repeatedly has appeared on national and major market television shows, personally and actively promoting his relationship with Sirius. On November 17, 2004, Stern was the featured guest on the nationally broadcast "David Letterman" late-night show on CBS television, spending the better part of 14 minutes talking about his move to Sirius. This show was rebroadcast on December 27, 2004. One year later, on November 17, 2005, he returned to the Letterman show, this time for seven minutes, spending most of the time literally handing out Sirius radios to members of the studio audience. Stern also was featured on "60 Minutes," one of America's premier television news magazines, in a fourteen-minute interview with Ed Bradley on December 4, 2005, a program that "60 Minutes" later reported was its "best delivery in adults 18-49 since Dec. 19, 2004" and led to "its highest adults 25-54 rating since Oct. 31, 2004." See CBS Press Release, "*60 Minutes' Scores Highest Rating in Adults 18-49 in a Year*" (Dec. 6, 2005). On January 5, 2006, Larry King devoted an entire show – forty-two minutes of programming time on CNN – to Stern and his relationship with Sirius. Stern also appeared for eight minutes on NBC's "Today" show on January 9, 2006 touting Sirius.

1. TV Hits

53. I estimate that Stern's twenty-three-minute appearance on "Letterman" would have cost Sirius more than \$1.6 million had it purchased that amount of time during the

Letterman show to run commercials to promote its service, making the “marketing value” of that Letterman appearance approximately \$4.8 million. (This figure is based on the methodology explained above.)

54. Stern’s appearance on 60 Minutes had a “marketing value” of \$5.2 million. His “Larry King” appearance was worth \$2.5 million. His “Today” appearance was worth nearly \$5 million.

55. Totaling all of Stern’s Sirius-related television “hits” that we were able to gather and validate since his jump to satellite radio was announced in October 2004, I calculate that he garnered over \$95 million in marketing/publicity value for Sirius just in the subset of TV markets analyzed.

2. Newspaper/Magazine Hits

56. Howard Stern’s move to Sirius also received enormous print coverage in both newspapers and magazines, particularly in New York, “the advertising capital of the world.” For example, *Esquire*, *New York*, *Wired*, and *Billboard* all published extensive cover stories. Sample cover pages for these stories are attached as SDARS-Silverman Exhibit 2. Similarly, the news of Stern’s jump to Sirius received front-page coverage in *The New York Times*, *New York Post*, *New York Daily News*, and *USA Today*. The *Wall Street Journal* gave the story prominent display as well.

57. Using the methodology described above, I calculate conservatively that Stern’s relationship with Sirius has garnered a total of \$59,353,785 in marketing value just in the subset of newspapers and magazines measured in this analysis as a result of magazine and newspaper coverage of Sirius since 2004. (In the chart that follows, I list both the “straight advertising value” of the “hits” as well as the “marketing value” I have assigned to them.)

3. Radio Hits

58. As discussed earlier, radio proved nearly impossible to track for purposes of this report. There are more than 11,000 terrestrial radio stations in America, and I am aware of no service that monitors content (except on a custom-contracted basis) from the stations. I was, however, able to gauge at least some of the marketing value of Stern's nearly non-stop discussions about his move to Sirius on his CBS Radio Show from October 6, 2004, when he announced that he was moving, to the end of 2005, when he last appeared on terrestrial radio. Stern's production company owns the tapes of his CBS Radio programs, and summaries of each show were available for analysis.

59. The summaries are broken down by topic and are time-coded. For example, the summary for the October 6, 2004 program begins at time-code 06:01 a.m., and the content of the program is summarized to 06:08 a.m. The content includes a "tease" about "the important announcement that Howard is going to make later in the program." The next section, from 06:06 to 06:08, is about David Letterman's comments about Jay Leno's announcement that he planned to step down as host of the NBC "Tonight" show in five years. That was followed by a three-minute segment on the Vice Presidential debates, which apparently had taken place a day or two earlier.

60. Using these summaries, I was able to estimate the "advertising" and "promotional" value of the time Stern spent on the show talking about his move to Sirius. According to a recent Advertising Age article, the national rate for a 60-second commercial on the CBS Radio Howard Stern show (with the copy read by Stern) was \$30,000. *See Advertising Age*, Sept. 24, 2006. I calculated the "Stern on Stern moving to Sirius" content of his shows as if

it were advertising copy using that rate. I did not apply a “marketing value” multiplier to the “estimated advertising cost” of this content because it is unique.

61. We were able to analyze the content of all of Stern’s shows (245 episodes, each four hours long) for the period during which he promoted his move to Sirius on CBS Radio. Anecdotal information suggests that he devoted fairly long chunks of every show every day to the move. In fact, his on-air discussions about the move reached a point where CBS management prohibited him from using the word “Sirius,” so from that point on, he referred to Sirius on his show as “eh, eh, eh.” I have calculated the value of Stern’s on-air mentions during that fifteen-month period to be \$52,860,000. As we were using summaries, rather than full transcriptions of the Stern shows, I was particularly conservative in determining which segments should be considered “promotional” and which were not, and how much time to allocate to these mentions.

62. Further insight into the “promotional value” of Stern talking about his move to Sirius can be gleaned from the complaint filed in February 2006 by CBS Radio when it sued Howard Stern, Stern’s production company, his agent/manager, and Sirius for, among other things, misappropriation of CBS’s broadcast time. To quote from the complaint:

Stern’s incessant promotion of Sirius also included the denigration of terrestrial radio. For example, on his October 7, 2004 Program, fifteen months before the expiration of the Agreement with CBS Radio, Stern and two of his staff proclaimed the benefits of moving to Sirius satellite radio and how it has hundreds of channels, and touted many of the specific channels available on Sirius. They also extolled how Sirius satellite radio has channels for everyone, including CNN, NBC, and a channel that carries NFL coverage.

Complaint, *CBS Radio Inc. v. Stern*, Index No. 06600672, ¶ 51 (N.Y. Sup. Ct. filed Feb. 28, 2006).

63. The complaint continues: "On October 8, 2004, Stern again urged his audience to move to satellite radio with him, and he even endorsed Sirius' monthly fee as a bargain." *Id.* ¶ 52. The complaint concludes: "This type of promotion of Sirius by Stern was extensive and continued over the last 15 months of the Agreement." *Id.* CBS alleged that "the dollar value of free advertising that Stern had been performing for Sirius . . . is conservatively estimated at approximately \$100 million." *Id.* ¶ 70. As CBS may have been able to calculate the time Stern spent "promoting Sirius" on its air more precisely than I was, its estimate (which is roughly double mine) may not be farfetched.

64. A 2004 document presented to Sirius' Board of Directors includes, as one of the stated benefits of the Howard Stern deal, the following: "[[
]]."
 See "Howard Stern" Sirius document, SIR00038000, at SIR00038011. It appears Sirius achieved that objective; altogether, I very conservatively estimate the marketing/promotional value to Sirius of the Stern deal (since it was announced to date, and only on the impressions I measured) as follows:

SIRIUS/HOWARD STERN			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	2,121	\$19,034,680	\$95,173,399
Newspapers and Magazines	913	\$11,870,757	\$59,353,785
Radio	1,762 Minutes	\$52,860,000	\$52,860,000
TOTALS	--	\$83,765,437	\$207,387,184

Sirius/NFL Deal

65. As with the Sirius/Stern deal, I have approximated the marketing/promotional value of the publicity generated by Sirius' and XM's deals for other talk/sports programming, including the National Football League. The NFL is America's number one sports league. It has millions of fans across the country, and the league and its teams receive heavy coverage in newspapers and magazines and on television, radio, and the Internet. Sirius' deal with the NFL was widely reported and commented on. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the Sirius/NFL deal as follows:

SIRIUS/NFL			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	47	\$53,126	\$159,378
Newspapers and Magazines	32	\$225,697	\$1,128,485
TOTALS	79	\$278,823	\$1,287,863

Sports deals – even deals as big as Sirius' NFL deal – rarely generate huge press coverage. But they do result in ongoing publicity that constantly reminds prospects and subscribers that their favorite team – regardless of where they live – is available to them on satellite radio. The Sirius/NFL deal generated (and continues to generate) a constant stream of positive mentions in important sports-news venues for the service. For example, in March 2006, an off-season month for NFL news (with NCAA March Madness, MLB spring training, and NBA regular season

news all competing for attention), Sirius was mentioned in 36 sports columns published in papers across the nation. In many of these, the NFL beat writers, unable to contact players and coaches in the off-season, were able to glean valuable information from interviews broadcast on Sirius and use quotes from Sirius' programming in their columns, crediting Sirius as the source. As *New York Daily News* media columnist Bob Raissman wrote on March 26, 2006, "With the opening of baseball just a week away, NFL freaks may not get the comprehensive off-season coverage the sport has received up to this point. So if your head is made of pigskin, you should check out the offerings of Sirius Satellite Radio's NFL Network. This is the best place to hang your hat in the days leading up to the draft." Finally, as discussed earlier, in addition to expected publicity, there is enormous value to the cross-promotions that are built into the various sports deals that Sirius and XM have entered into, such as stadium signage, logos on websites, mentions during television programming, etc.

Sirius/Martha Stewart Deal

66. The Martha Stewart deal was a part of Sirius' marketing strategy to provide "tie-breaker" reasons beyond music to subscribe to its service. The Martha Stewart Living Radio Channel targets a demographic that is typically not well served by terrestrial talk radio and complements nicely the demographic that Sirius reaches through its Howard Stern programming. Martha Stewart arguably is one of the most famous and admired female media personalities in the country, and Sirius hoped that her "star power" would engender heavy promotional benefits for Sirius. Using the methodology described earlier, I estimate the marketing/promotional value of the publicity generated by the Sirius/Martha Stewart deal (again, only in the limited media that I have measured) as follows:

SIRIUS/Martha Stewart			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	291	\$961,041	\$2,883,123
Newspapers and Magazines	78	\$1,057,198	\$5,285,990
TOTALS	369	\$2,018,239	\$8,169,113

In addition to publicity, Sirius also has benefited from mentions on Martha's television show, on her website, and on other Martha Stewart Omnimedia properties. For example, Martha devoted a segment on an episode of her nationally syndicated television show to "How to Set Up a Sirius Satellite Radio."

Sirius/NASCAR Deal

67. NASCAR is America's fastest growing sport. It has millions of fans across the country, and its races receive heavy coverage in newspapers and magazines, and on television, radio, and the Internet. Sirius' deal with NASCAR was widely reported and commented on. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the Sirius/NASCAR deal in the measured media as follows:

SIRIUS/NASCAR			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	78	\$54,286	\$162,858
Newspapers and Magazines	24	\$279,207	\$1,396,035
TOTALS	102	\$333,493	\$1,558,893

Because automotive and racing enthusiast magazines were not trackable for purposes of my analysis, this chart understates the number of hits and value of publicity that resulted from the NASCAR deal. Coverage of the NASCAR/Sirius relationship and information about the NASCAR Channel and racing coverage on the service has been widely and regularly reported in the enthusiast press. In addition to the consumer marketing value of these unreported hits, they also undoubtedly impact the automotive industry, thus supporting Sirius' OEM marketing efforts as well.

XM/MLB Deal

68. Baseball is "America's Game," and XM gives "disenfranchised" baseball fans across the country access to play-by-play exploits of their favorite teams. XM's 24/7 MLB Channel provides year-round coverage of baseball for XM subscribers. MLB and its teams receive heavy coverage on television and radio, in newspapers and magazines, and on the Internet. XM's deal with MLB was widely reported and commented on. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the XM/MLB deal in measured media as follows:

XM/Major League Baseball			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	101	\$62,640	\$187,920
Newspapers and Magazines	30	\$265,831	\$1,329,155
TOTALS	131	\$328,471	\$1,517,075

XM/Oprah Winfrey Deal

69. There is a widely recognized marketing phenomenon in America called "The Oprah Effect." When Oprah endorses a book, a movie, a play, or a product on her daily syndicated television show, her legions of fans flock to stores and theaters, turning Oprah-endorsed books, movies, plays and products into "hits." Like Martha Stewart, Oprah's appeal is primarily to women, an audience that is under-served by terrestrial talk radio. Thus, in addition to its pure programming value and exclusivity, XM's deal with Oprah, which includes an extensive list of marketing activities, was intended to tap into "The Oprah Effect." Using the

methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the XM/Oprah deal in the measured media as follows:

XM/OPRAH WINFREY			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	353	\$1,855,328	\$5,565,984
Newspapers and Magazines	77	\$613,823	\$3,069,115
TOTALS	430	\$2,469,151	\$8,635,099

XM/Opie & Anthony Deal

70. Much like Howard Stern, "shock jocks" Opie & Anthony pushed the envelope on their daily terrestrial radio show to the point that the stations that carried them risked being fined by the FCC. And that made "uncensored" XM a perfect home for them. Originally exclusive on XM, Opie & Anthony later returned to being syndicated on terrestrial radio as well (although in a more censored version vis-à-vis what the pair airs on XM) as part of a deal with CBS that XM entered into in part for its promotional benefits. The Opie & Anthony deal and their continued relationship with XM has generated quite a lot of media coverage. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the XM/Opie & Anthony deal on the measured media as follows:

XM/OPIE & ANTHONY			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	163	\$685,279	\$2,055,837
Newspapers and Magazines	220	\$1,886,346	\$9,431,730
TOTALS	383	\$2,571,625	\$11,497,567

* * *

71. The charts above only reference marketing publicity hits that we were able to track using the methodology discussed earlier. These totals do not include the value of Internet hits, which we were unable to measure. With the exception of Howard Stern, they also do not include the value of radio hits. Nor do they include the numerous other hits on television, in newspapers and magazines, at sports venues, and at point-of-sale that we were not able to document. And, of course, it does not include the value of marketing/publicity generated by other Sirius and XM news/talk/sports programs that I did not undertake to analyze in detail.

72. While, as shown above, both Sirius and XM undoubtedly benefited from "general" news coverage during the period surveyed, *virtually no coverage that could be characterized as having marketing value was specifically generated by the services' "generic" music programming.*

CONCLUSION

73. The foregoing analysis helps to demonstrate that news/talk/sports programming is the engine powering awareness of and preference for the satellite radio services. To equate music and news/talk/sports in terms of dollar-for-dollar value is to ignore the fact that, as is the

case in marketing any product, branding is all about differentiation. "Commercial-free music" is not unique, not as promotable, and not as potent from a marketing and sales standpoint as exclusive news/talk/sports programming. The ultimate success of Sirius and XM will be the result of their exclusive news/talk/sports deals powering their consumer marketing programs.

74. The publicity generated by the presence of Stern, Oprah, MLB, the NFL, et al. on Sirius and XM also "rang Madison Avenue's bell," thus creating a potentially powerful additional revenue stream for the services that simply playing sound recordings – however creatively programmed – cannot deliver.

75. In his testimony on July 9, 2007, the following exchange took place between Dr. Pelcovits and Mr. Handzo, counsel for SoundExchange:

Q: Now, Dr. Pelcovits, in basing this analysis on the deal between Howard Stern and Sirius, did you have any concerns that Howard Stern is just not typical?

A: I am not concerned about that. I believe that, in fact, Howard Stern is a very appropriate benchmark to look at to set the royalty on music. Howard Stern is certainly very important, attracts a significant percentage of customers, but I have seen nothing that would indicate he is more important than, let's say, the music catalog of Universal Music Group or Sony BMG.

7/9/07 Tr. 72:8-20 (Pelcovits).

76. Dr. Pelcovits' answer belies common sense and the facts, and underscores just how "apples-to-oranges" his analysis is. Howard Stern is a star. Oprah Winfrey is a star. The NFL is a "star." Major League Baseball is a "star." And stars drive entertainment. It has been that way since the days of Douglas Fairbanks and Mary Pickford. It is why Tom Hanks can "open a movie," and a lesser-known actor cannot. It is why radio stations pay ordinary salaries to some deejays and millions of dollars annually to others – who play exactly the same music as

their less compensated brethren. Stars get the big bucks because they generate attention -- publicity. By signing Howard Stern, Oprah Winfrey, the NFL, MLB, Opie & Anthony, Martha Stewart, NASCAR, and other "high marketing value" news/talk/sports programming, Sirius and XM bought themselves far more than programming; they bought the marketing power of publicity. That is why Howard Stern was worth \$500 million to Sirius. And it is why he, and Sirius' and XM's other exclusive or unique news/talk/sports programming, cannot be compared to music that can be found almost everywhere.

Appendix: Materials Reviewed

- the Introductory Memoranda to the Written Direct Statements of XM Satellite Radio Inc. and Sirius Satellite Radio Inc.;
- the original and amended Written Direct Testimony of Michael Pelcovits;
- the Written Direct Testimony and hearing testimony of various Sirius and XM witnesses;
- Sirius' agreements with Howard Stern, the NFL, Martha Stewart, NASCAR, the NBA, and Fox News;
- XM's agreements with MLB, Oprah Winfrey, Opie & Anthony, and Fox News;
- XM and Sirius presentations relating to the deals analyzed;
- Various Sirius market research documents;
- XM's and Sirius' websites;
- figures showing Sirius and XM subscriber growth by quarter;
- various Sirius press releases announcing key statistics and programming deals for Sirius;
- charts prepared by XM reflecting the Services' programming history and subscriber growth by quarter from Q1 2002 to Q1 2007;
- financial data for XM and Sirius;
- the "Binding Memorandum of Understanding" between Learfield Communications, Inc. and XM Satellite Radio Inc.;
- the complaint in *CBS Radio, Inc. v Howard Stern, et al.*, filed by CBS Radio, Inc. in the Supreme Court of the State of New York, dated February 28, 2006; and

- copies of newspaper and magazine articles referencing Sirius and XM programming deals.
- An Advertising Age magazine article referencing the rate CBS Radio charged for The Howard Stern show
- Advertising rate cards posted on publication web-sites for certain publications

Before the
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LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
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)
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Adjustment of Rates and Terms for)
Preexisting Subscription and Satellite)
Digital Audio Radio Services)
_____)

Docket No. 2006-1 CRB DSTRA

DECLARATION OF BRUCE SILVERMAN

I, Bruce Silverman, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned matter are true and correct to the best of my knowledge, information and belief. Executed this 23rd day of July 2007.



Bruce Silverman

BRUCE SILVERMAN

EXPERIENCE

May 05 - Present

BRUCE SILVERMAN CONSULTING Principal

Adviser to a number of major advertising and public relations agencies, media properties, marketing services firms and international companies. Chairman and CEO of Pocket Billboards, Inc., a company that places advertising on telephone calling cards. Expert witness for law firms representing clients in cases where marketing, advertising or media is at issue.

January 2004 - April, 2005

WONGDOODY ADVERTISING (Los Angeles) President

Clients included Alaska Airlines, Autodesk, MGM Home Entertainment, Sony Pictures, Los Angeles Dodgers, Alpine Electronics, Clif Bar, Inc., UCLA/Anderson School of Management.

April, 1997 - Dec., 2003

INITIATIVE PARTNERS (Los Angeles) President/CEO

Management responsibility for U.S. unit of world's largest (\$22BB+) advertising media agency. Accounts included Walt Disney Company (all divisions), CKE Restaurants (Carl's Jr.), Unilever, United Paramount Network, Arco, Tosco, E*Trade, Albertson's, Baskin-Robbins, Cisco Systems, HealthNet, The Home Depot, Taco Bell plus more than 100 advertising agencies operating throughout the United States and Canada

January 86 - March '97

ASHER/GOULD ADVERTISING, INC. (Los Angeles) Partner/President/Chief Creative Officer/Chief Operating Officer

Clients included Suzuki cars and trucks; Pabst Brewing Company, Southern California Cable Association; Pizza Hut; Sanyo/Fisher; ITT/Sheraton; State of California Department of Health Services; American Savings Bank; Baskin-Robbins U.S.A.; SunAmerica,

Avery Dennison, Wherehouse Entertainment, The Men's
Wearhouse, Aaron Brothers

January 84 - December 86

BBDO/WEST, INC. (Los Angeles, San Francisco)

Executive Vice President; General Manager and Chief Creative
Officer

Accounts included Apple Computer International, Coldwell
Banker, Sizzler, PIP Printing, Hughes Supermarkets, Fisher Stereo,
Southern California Dodge Dealers

January 81 - December 83

BOZELL & JACOBS, SOUTHWEST, INC. (Dallas)

Executive Vice President; Creative Head of B&J operations in
Dallas, Houston, Phoenix

Accounts included American Airlines, Greyhound, Zale
Corporation, Pace Foods, Quaker Oats, Armour Foods, Ryder
Trucks

August 67 - December 80

OGILVY & MATHER, INC. (New York)

Senior Vice President; Executive Creative Director, O&M New
York. Also ECD, Los Angeles (1977-80); Houston (1974-77);
Associate Creative Director, OBM London (1974), O&M New
York (1972-74).

Accounts included American Express, Shell, Merrill Lynch,
Mercedes Benz, Panasonic, Maxwell House, Nabisco cookies and
crackers, Post cereals, Imperial Margarine, Dove soap, Smith
Barney, Mattel, Universal Studios, Trailways, Opryland USA,
Ringling Bros. Barnum & Bailey Combined Shows, Korean
Airlines, TWA, KLM, Puerto Rico Tourism, British Tourism,
French Tourism, Nickelodeon, MTV

EDUCATION

June 1966

BA, Adelphi University, Garden City, New York

INDUSTRY

Vice Chairman, Western Region - American Association of Advertising Agencies (industry trade association)

National Board of Directors – American Association of Advertising Agencies

Vice President – Los Angeles Advertising Agencies Association

Member and Peer Group Chairman – Academy of Television Arts & Sciences

OTHER

Author: *How to Create Tobacco-Use Prevention Advertising That Works*; University of Florida Press, 1996

Instructor: UCLA Extension, Pepperdine University

Guest Instructor: University of Southern California, University of Texas, Rice University

Awards: Multiple Clios, One Show "Pencils," multiple Beldings, two Gold Lions at Cannes International Advertising Festival

PERSONAL

Married
Excellent Health

**THIS APPENDIX CONTAINS
RESTRICTED INFORMATION
PURSUANT TO THE DECEMBER 20,
2006 PROTECTIVE ORDER AND
THEREFORE WAS OMITTED FROM
THIS PUBLIC VERSION**

**THIS EXHIBIT CONTAINS
RESTRICTED INFORMATION
PURSUANT TO THE DECEMBER 20,
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Esquire

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JANUARY 2006

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STERN**

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Alyssa Milano

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(PAGE 120)

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DESTINATION: NYC HOLIDAY SLACKERS DECLARES THE MUSICAL MOVIE OF
THE MUSICAL OF THE MOVIE

DECEMBER 12, 2005

PLUS
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LIVING
'90s
STYLE
'80s
STYLE
'70s
STYLE
'60s
STYLE
(P.55)

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Billboard Radio Monitor

WEEK OF NOVEMBER 25, 2005

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SIRIUS SATELLITE RADIO
1221 AVENUE OF THE AMERICAS
NEW YORK, NY 10020-1011



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BABA BOOEY
OPENS HIS KIMONO

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DON BUCHWALD**
DISHES ON THE DEALS

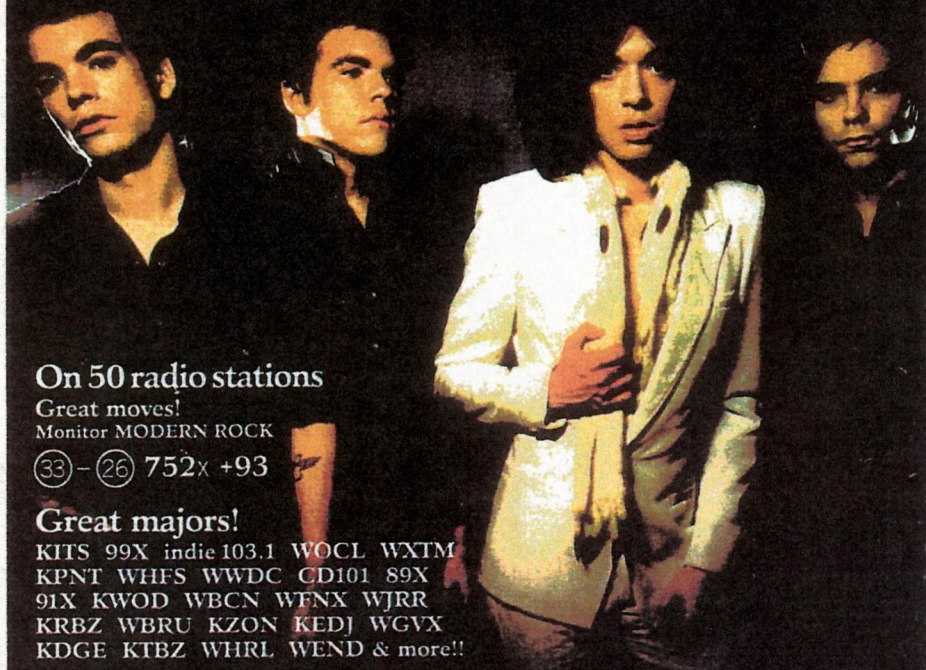
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HOWARD'S BRUSHES
WITH THE FCC

STERN'S LEGACY

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PD _____ GM _____ MD _____
PROMO _____ NEWS DIR. _____

Living Things *Bom Bom Bom*



On 50 radio stations

Great moves!
Monitor MODERN ROCK

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Great majors!

KITS 99X indie 103.1 WOCL WXTM
KPNT WHFS WWDC CD101 89X
91X KWOD WBCN WFNX WJRR
KRBZ WBRU KZON KEDJ WGVX
KDGE KTBZ WHRL WEND & more!!

Cingular wireless iPod commercial starts in December

★★★★ Rolling Stone ★★★★★ Blender B+ Spin ★★★★★ Maxim

"Living Things are a band of fighters determined to make us feel like winners."

— David Fricke, Rolling Stone

"Everybody whines that there aren't enough driven, inspiring, hot, rock songs out there. Well now you have the Living Things...so shut up already."

— Sean Demery, KITS

Add!!   



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D

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15 MAVERICKS & DREAMERS REINVENTING BUSINESS, SCIENCE, BLOGS, MOVIES & MORE!

WIRED

MARCH 2005 STAY TUNED

THE END OF RADIO

(AS WE KNOW IT)

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HOWARD STERN & THE SATELLITE WARS

YOUR GUIDE TO PODCASTING, RADIO TIVO & THE HD REVOLUTION

